INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The Board's conclusions and order	6
C. The decision of the court of appeals	7
Summary of argument	7
Argument	10
I. The union violated Section 8(b)(4)(ii)(B) of the Act when it picketed Safeway stores to pursuade their customers not to purchase products of the primary employer, Tree Fruits	10
A. The language of Section 8(b)(4)(ii) clearly encompasses and prohibits secondary consumer picketing	12
B. The legislative history of Section 8(b)(4)(ii) establishes that Congress gave specific consideration to the banning of secondary consumer picketing and drew this section to accomplish that result	16
II. Section 8(b)(4)(ii) as applied in this case is constitutional	29
Conclusion	37
Appendix	38

(I)

708-440—82—1

CITATIONS

Cases:

	Page
Bakery Drivers v. *Wohl*, 315 U.S. 769	30
Building Service Employees v. *Gazzam*, 339 U.S. 532	30, 31
Burr and Perfection Mattress & Spring Company v. *National Labor Relations Board*, 53 LRRM 28	11, 18, 28, 29, 36
Carlson v. *California*, 310 U.S. 106	36
Chauffeurs, Local Union 795 v. *Newell*, 356 U.S. 341	36
Electrical Workers, Local 501 v. *National Labor Relations Board (Langer)*, 341 U.S. 694	9, 15, 31, 32, 35, 36
Giboney v. *Empire Storage and Ice Co.*, 336 U.S. 490	31, 32
Highway Truck Drivers and Helpers, Local 107 v. *National Labor Relations Board*, 273 F. 2d 815	13
Hughes v. *Superior Court*, 339 U.S. 460, affiirming 32 Cal. 2d 850, 198 P. 2d 885	8, 10, 13, 30, 31, 32, 33, 34, 35
Local 1976, Carpenters' Union v. *National Labor Relations Board*, 357 U.S. 93	17
National Labor Relations Board v. *Associated Musicians, Local 802*, 226 F. 2d 900, certiorari denied, 351 U.S. 962	13
National Labor Relations Board v. *Business Machine & Office Appliance Mechanics Conference Board*, 228 F. 2d 553, certiorari denied, 351 U.S. 962	17
National Labor Relations Board v. *Dallas General Drivers, Local 745*, 264 F. 2d 642, certiorari denied, 361 U.S. 814	13
National Labor Relations Board v. *Drivers, Local 639 (Curtis Bros.)*, 362 U.S. 274	16
National Labor Relations Board v. *Ford*, 170 F. 2d 735	12

Cases—Continued

	Page
National Labor Relations Board v. *Hill & Hill Truck Line, Inc.*, 266 F. 2d 883	12
National Labor Relations Board v. *International Union of Brewery Workers*, 272 F. 2d 817	17
National Labor Relations Board v. *Laundry, Linen Supply & Dry Cleaning Drivers, Local 928*, 262 F. 2d 617	13
National Labor Relations Board v. *Reed*, 206 F. 2d 184	13
National Labor Relations Board v. *Servette, Inc., No. 111*, this Term	6
National Labor Relations Board v. *United Steelworkers*, 250 F. 2d 184	13
Plumbers Union v. *Graham*, 345 U.S. 192	31
Progressive Mine Workers v. *National Labor Relations Board*, 187 F. 2d 298	12
Rabouin v. *National Labor Relations Board*, 195 F. 2d 906	17
Sealright Pacific, Ltd., 82 NLRB 271	17
Teamsters v. *Vogt*, 354 U.S. 284	31
Thornhill v. *Alabama*, 310 U.S. 88	36
United Wholesale & Warehouse Employees, Local 261 v. *National Labor Relations Board*, 282 F. 2d 824	17
Upholsterers Frame and Bedding Workers (Minneapolis House Furnishing Co.) 132 NLRB 40	17

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):	
Section 7	38
Section 8(a)(1)	12
Section 8(b)(1)	12, 16
Section 8(b)(4)	6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 27, 29, 31, 37, 38
Section 8(b)(7)	14, 15, 18

Statute—Continued

	Page
National Labor Relations Act, 61 Stat. 136	
8(b)(4)	39–40
Miscellaneous:	
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086	17
105 Cong. Rec. 6666, II Leg. Hist. 1193	20
105 Cong. Rec. 6667, II Leg. Hist. 1194	20
105 Cong. Rec. 6671, II Leg. Hist. 1198	20
105 Cong. Rec. 15532, II Leg. Hist. 1568	21
105 Cong. Rec. 15672–15673, II Leg. Hist. 1615	21
105 Cong. Rec. 16591, II Leg. Hist. 1708	23
105 Cong. Rec. 17328, II Leg. Hist. 1378	25
105 Cong. Rec. 17882, II Leg. Hist. 1426	27
105 Cong. Rec. 17898–17899, II Leg. Hist. 1432	9, 24
105 Cong. Rec. 17904, II Leg. Hist. 1437	26
105 Cong. Rec. 18133, II Leg. Hist. 1720	26
105 Cong. Rec. 19771, II Leg. Hist. 1857	25
105 Cong. Rec. 19849, II Leg. Hist. 1823	26
105 Cong. Rec. 19954, II Leg. Hist. 1842	21
Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257 (1959)	17
Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191 (1950)	34–35
Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 86th Cong., 1st Sess., S. 505, *et al.*, p. 266	19
H.R. 8400, Sec. 705(a), I Leg. Hist. 681	21
2 Col. L. Rev. 1336	17

Miscellaneous—Continued

	Page
Ryan, *Secondary Boycotts Under the New Labor-Management Reporting and Disclosure Act of 1959*, 34 St. Johns L. Rev. 42	17
S. 748, Sec. 503(a), I Leg. Hist. (G.P.O., 1959) 142	18
S. 1555, Sec. 707(a), I Leg. Hist. 582	20
S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 475 (Minority Views), 1 Leg. Hist. 475	19

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 88

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 56–66) is reported at 308 F. 2d 311. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 34–44) are reported at 132 NLRB 1172.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1962 (R. 67). The Board's petition for rehearing was denied on October 12, 1962 (R. 68). On January 9, 1963, the Chief Justice extended the time for filing a petition for certiorari to and including

March 11, 1963 (R. 69). The petition for a writ of certiorari was filed on March 11, 1963, and was granted on June 10, 1963 (R. 70; 374 U.S. 804). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

QUESTION PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force him to cease doing business with another person. A proviso excepts "publicity, other than picketing * * * as long as such publicity does not have an effect" on deliveries.

The question presented is whether picketing at retail stores, urging customers of the stores not to purchase products which the stores have obtained from an employer with whom the union has a primary dispute, constitutes a "threat, coercion or restraint" within the meaning of this section, absent a showing that the picketing in fact inflicted any economic injury upon the stores or otherwise had a coercive effect.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 38–40.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Tree Fruits is a corporation which represents 21 fresh fruit packing and warehousing firms in the Yakima, Washington area in collective bargaining with Local 760 (R. 35–36; 17–18, 23).[1] Three other firms in the area bargain separately with Local 760 (R. 36; 18). In 1960, the collective bargaining agreements between Local 760 and all these firms expired, and the parties attempted to negotiate new agreements (R. 36; 19). During negotiations, Tree Fruits proposed modifications in the agreement regarding such matters as union security, seniority, and overtime (R. 36; 19). These proposals were unacceptable to Local 760, and on August 29, 1960, Local 760 called a strike against employer-members of Tree Fruits and two of the independent firms (R. 36; 19).[2]

In December 1960, Local 760 decided, in furtherance of its dispute with the employers, to promote a "consumer boycott" of Washington State apples (R. 36–37; 1*a*). Local 760 requested Joint Council No.

[1] The two respondent labor organizations—Fruit & Vegetable Packers & Warehousemen, Local 760 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America—are referred to collectively as the "Union," and individually as Local 760 and the Joint Council, respectively. The Board found that they were jointly responsible for the picketing hereafter described (R. 41).

[2] An agreement was reached with the third independent firm, Pacific Fruit and Produce Company, and no strike was called against it (R. 19).

28, with which it is affiliated, to assign or "loan" Joint Council organizers to Local 760 for the purpose of assisting with this program (R. 36; 19). The Joint Council executive board assigned Fred Bowen, a Joint Council organizer, to work with Local 760 until further notice (R. 36; 19, 24, 25). In late December, Local 760 instructed Bowen to carry out a program of picketing and handbilling at the premises of certain Safeway stores in Seattle, Washington, which were selling apples obtained from members of Tree Fruits (R. 36–37; 19–20).

Before the picketing began, the Union instructed the pickets to limit their activity to the consumer entrances to the stores; not to urge customers to refrain from patronizing the stores but merely to stop buying Washington State apples; and not to interfere with the work of employees in the stores or with pickups or deliveries to the stores (R. 37; 20, 27–28). Similarly, the Union gave each store manager a written document which recited Local 760's version of its dispute with Tree Fruits and explained that the purpose of the picketing was merely to make an appeal to consumers not to buy Washington State apples. The document added that, if any of the store employees stopped work or if deliveries were interfered with, the Union should be promptly notified and it would take steps to correct the situation (R. 37–38; 20, 29–30).[3]

[3] The same notice also advised the manager that if, contrary to the Union's information, the store was "selling apples exclusively from another state, please notify the undersigned

On December 27 and 29, 1960, and on nine days in January 1961, pickets appeared at 46 Safeway stores located in and near Seattle, Washington (R. 38; 20; 26).[4] The pickets carried placards which stated (R. 38; 20, 33):

> TO THE CONSUMERS: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON

The pickets also distributed handbills which urged the public not to buy Washington State apples because the 1960 crop was being packed by non-union firms which were "unfair" to their employees (R. 38; 20–21, 31, 32).

The pickets arrived after the stores opened for business and left before the stores closed (R. 38; 21). They patrolled the sidewalks in front of the main customer entrances to the stores. At no time did the pickets walk in front of store entrances used solely by employees, or used exclusively for delivery of merchandise (R. 38; 21). At locations where stores were situated to the rear of a parking lot, the pickets confined their picketing to the public sidewalk near the entrance to the parking lot (R. 38; 21).

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and we will see that the pickets are transferred to another store where Washington States Apples are actually being sold" (R. 30).

[4] In most cases, two pickets appeared at each store, and at one store there were three. Generally the pickets remained for one or two days at a particular store although one store was picketed for a total of six days and another for four (R. 20, 26).

During the picketing, the employees of the stores continued to work in the normal way, and the stores continued to receive deliveries of merchandise as usual. No deliveries or pickups were stopped or interfered with, and no employee of Safeway or of any other employer quit work or refused to handle fruit packed by the employer-members of Tree Fruits (R. 39; 21). The picketing was peaceful at all times (R. 39; 21).

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the picketing at the Safeway stores was intended to threaten, restrain, or coerce Safeway for the purpose of forcing and requiring Safeway to cease selling or handling the products of the members of Tree Fruits. Accordingly, the Board held that, by engaging in such picketing, Local 760 and Joint Council No. 28 violated Section 8(b)(4)(ii)(B) of the Act (R. 41–47). The Board ordered respondents to cease and desist from the unfair labor practices, and to post appropriate notices (R. 42–43).[5]

[5] The Board dismissed the complaint insofar as it alleged that the Union's picketing also violated Section 8(b)(4)(i)(B) of the Act (R. 39–40). That section makes it an unfair labor practice for a union to "induce or encourage" employees of secondary employers to engage in a work stoppage or a refusal to perform services for the proscribed object (p. 38, *infra*).

The complaint did not contest the propriety of the Union's handbilling at the retail stores. The issue of whether such handbilling is within Section 8(b)(4)(ii)(B) and, if so, the extent to which it is privileged by the "publicity" proviso is presented in *National Labor Relations Board* v. *Servette, Inc.*, No. 111, this Term.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order, and remanded the case to the Board for further proceedings. The court acknowledged that the legislative history as well as the words of the second proviso to Section 8(b)(4) supported the Board's view that the phrase "threaten, coerce, or restrain any person," as used in that section, was intended to outlaw all peaceful "consumer" picketing at the premises of a neutral employer when conducted in furtherance of the objectives proscribed by subparagraph (B) of that section (R. 61–62). The court concluded, however, that this interpretation "would raise serious constitutional questions," and therefore it interpreted those terms as barring consumer picketing only where it could be shown that in fact such picketing had had a coercive effect upon the neutral employer (R. 62–66). Since the Board had proceeded upon an erroneous legal premise that the statute completely bans consumer picketing at the premises of the secondary employer, the court remanded the case so as to permit the Board to take evidence on "whether Safeway was in fact threatened, coerced, or restrained" (R. 66).

SUMMARY OF ARGUMENT

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force or require him to cease doing business with another person. The plain meaning of the words "threaten, coerce, or restrain" is broad enough to en-

compass picketing at the premises of a neutral employer which appeals to his customers not to buy the products of an unfair employer which he handles—without regard to whether such picketing can be shown to have inflicted economic injury on the neutral employer or to have been otherwise coercive. For, as this Court recognized in *Hughes* v. *Superior Court*, 339 U.S. 460, 465, "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication * * *." Thus, the mere presence of a consumer picket line at a neutral employer's premises imposes a threat of business loss which would tend to restrain and coerce that employer, and thereby exert pressure on him to cease business relations with the primary employer. The language of the second proviso to Section 8(b)(4) further indicates that subparagraph (ii) encompasses consumer picketing, irrespective of its actual impact on the neutral employer. That proviso excepts from the ban of Section 8(b)(4) "publicity, other than picketing," as long as such publicity does not "have an effect" on pick ups and deliveries at the neutral employer's premises.

The legislative history of both Section 8(b)(4)(ii) and the publicity proviso confirms the foregoing conclusion. It shows that Section 8(b)(4)(ii) was designed to close certain "loopholes" which existed under the old Section 8(b)(4)(A), and one of those specifically enumerated was the imposition of pressure on a neutral employer by means of picketing addressed to his customers. However, the language of the proposed amendment, i.e., "to threaten, coerce, or re-

strain," was broad enough to encompass not only picketing but also appeals to consumers by handbills and other forms of publicity. In the Conference Committee, a proviso was added to except "publicity, other than picketing," in certain circumstances. As Senator Kennedy explained: "We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. 105 Cong. Rec. 17898–17899, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 1432.

The words of Section 8(b)(4)(ii), the proviso, and the extensive and specific legislative history on this very point, in our judgment, establish that the statute, as drafted by the Congress and as intended, bans secondary consumer picketing without regard to its effect in the particular case. The question of the constitutionality of this ban is thus squarely presented and not to be avoided by interpretation.

The ban on consumer picketing imposed by Section 8(b)(4)(ii) does not contravene the free speech provisions of the First Amendment. It is settled that a State or Congress may, in enforcing a valid public policy, constitutionally enjoin peaceful picketing aimed at frustrating that policy. Thus, in *Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, it was held that Congress could validly ban peaceful picketing aimed at promoting a secondary boycott. Nor is that case distinguishable on the ground that there the picketing was directed at

unionized employees whereas here it is directed at members of the public. *Hughes* v. *Superior Court, supra,* shows that, even though the picketing seeks to attain its objective merely through an appeal to consumers not to patronize, it may be banned without offending the Constitution where the objective sought by the pickets is unlawful.

ARGUMENT

I

THE UNION VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT WHEN IT PICKETED SAFEWAY STORES TO PERSUADE THEIR CUSTOMERS NOT TO PURCHASE PRODUCTS OF THE PRIMARY EMPLOYER, TREE FRUITS

Section 8(b)(4) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, provides that it shall be an unfair labor practice for a labor organization or its agents—

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

The Union picketed 46 stores of Safeway (a person engaged in commerce or in an industry affecting commerce), with signs urging members of the consuming public not to purchase from Safeway apples which it

had obtained from Tree Fruits (with whom the Union had a primary dispute). The Board found (R. 41), and the court below did not disturb that finding, that the picketing had the secondary object forbidden by subparagraph (B)—"forcing or requiring" Safeway (any person) "to cease using, handling, * * * or otherwise dealing in the products" of Tree Fruits (any other producer, processor, or manufacturer). The only question is whether the Board properly held that such consumer picketing constituted action to "threaten, coerce, or restrain" Safeway, as those terms are used in subparagraph (ii). It is the Board's position that subparagraph (ii) prohibits picketing at the premises of a neutral employer which is addressed to his customers, whether or not there is a showing (which the court below would require) that such picketing has actually inflicted some economic injury upon the neutral employer or otherwise had a coercive effect. This position, we submit, is supported by the terms of the statute and its legislative history, and presents no constitutional problem.[6]

[6] The Board's position, although rejected by the court below, has been accepted by the Fifth Circuit in *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, Nos. 18748, 19080, 19162, decided July 18, 1963, 53 LRRM 2800. The court in that case held that consumer picketing of the type here not only threatened, coerced or restrained the neutral employer in violation of Section 8(b)(4)(ii)(B), but it also constituted an inducement to neutral employees to stop work in violation of Section 8(b)(4)(i)(B). The Board believes that the latter holding of the court is erroneous (see p. 17, n. 12, *infra*).

708-440—63——3

A. THE LANGUAGE OF SECTION 8(b)(4)(ii) CLEARLY ENCOMPASSES AND PROHIBITS SECONDARY CONSUMER PICKETING

The statute itself plainly establishes what is so clearly and unmistakably revealed by its legislative history—that Section 8(b)(4)(ii) encompasses and prohibits consumer picketing at the premises of a neutral employer (like Safeway), without regard to whether such picketing can be shown to have inflicted economic injury upon him in the particular case. The words "threaten, coerce, or restrain" reach any conduct which puts physical or economic pressure upon the secondary employer to bow to the union's will. There is no additional requirement that the threats, coercion or restraint be shown to have resulted in demonstrable economic injury or to have affected the conduct of the person against whom they are directed. Indeed, the mere act of threatening is barred, and by definition a threat is complete when made without regard to any consequences. Thus, a threat without more satisfies the literal terms of subparagraph (ii). If there were doubt, it would be removed by the settled construction of the words "coerce or restrain" in Sections 8(a)(1) and 8(b)(1), which had been held, long prior to 1959, not to require proof that the coercion or restraint actually affected employee activities. *National Labor Relations Board* v. *Ford*, 170 F. 2d 735, 738 (C.A. 6); *National Labor Relations Board* v. *Hill & Hill Truck Line, Inc.*, 266 F. 2d 883, 885 (C.A. 5); *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298, 301

(C.A. 7); *National Labor Relations Board* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9).

Consumer picketing imposes just such a threat and this Court has so recognized. *Hughes* v. *Superior Court*, 339 U.S. 460, 465; see, *infra*, pp. 32–34. The mere existence of a consumer picket line at a neutral employer's premises carries a threat of business loss which would exert pressure on him to cease business relations with the primary employer. Therefore, such picketing can reasonably be viewed as "threatening, restraining, or coercing" the neutral employer irrespective of whether it in fact caused him any economic loss. This conclusion, moreover, is consistent with the rule governing the application of Section 8(b)(4) in other instances, *i.e.*, that a violation of that provision does not ordinarily depend upon the success or failure of the union's efforts in applying pressure.[1]

The language of the second proviso to Section 8(b)(4) confirms that subparagraph (ii) encompasses consumer picketing, irrespective of its actual impact on the neutral employer. As noted, Section 8(b)(4)(ii) makes it an unfair labor practice to

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[1] See *Highway Truck Drivers and Helpers, Local 107* v. *National Labor Relations Board*, 273 F. 2d 815, 818 (C.A. D.C.); *National Labor Relations Board* v. *Associated Musicians, Local 802*, 226 F. 2d 900, 904–905 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *United Steelworkers*, 250 F. 2d 184, 187 (C.A. 1); *National Labor Relations Board* v. *Laundry, Linen Supply & Dry Cleaning Drivers, Local 928*, 262 F. 2d 617, 620–621 (C.A. 9); *National Labor Relations Board* v. *Dallas General Drivers, Local 745*, 264 F. 2d 642, 648 (C.A. 5), certiorari denied, 361 U.S. 814.

"threaten, coerce or restrain any person" for the prohibited objective, and then there is a proviso which excepts—

> publicity, *other than picketing*, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute * * *. [Emphasis added.]

Here, as the court below in essence conceded, is the plainest indication that Congress knew that the words "threaten, coerce or restrain any person" would apply to picketing, outside a retail establishment, appealing to the public not to purchase a product sold therein. Furthermore, a subsequent qualification to the exception created by the proviso shows that Congress, when it intended to condition a proscription against secondary activity upon proof of its effect, said so explicitly; the qualification permits union publicity, other than picketing—

> as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.[8]

[8] See also the second proviso to Section 8(b)(7)(C), added by the 1959 amendments to the Act. That proviso excepts from the limitation on recognitional or organizational picketing imposed by Section 8(b)(7)(C), "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any

The fact that Section 8(b)(4)(ii) does not use the word "picketing," whereas Section 8 (b)(7)* does, does not warrant the inference that consumer picketing *per se* is untouched by the former provision. Section 8(b)(7) regulates only one form of activity, *i.e.*, picketing for recognitional or organizational purposes. Section 8(b)(4)(ii), on the other hand, was intended to encompass other forms of exerting pressure on a neutral employer in addition to consumer picketing (see *infra*, pp. 17–21). It was therefore reasonable for Congress to use a broader phrase than "picketing" to define the scope of Section 8(b)(4)(ii). There is no doubt, for example, that the equally broad language of Section 8(b)(4)(i) (*infra*, p. 38) which prohibits the inducement of strikes or other work stoppages, encompasses peaceful picketing directed at employees even though "picketing" is not specifically enumerated. See *Electrical Workers, Local 501* v. *National Labor Relations Board* (*Langer*), 341 U.S. 694, 701–702.

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other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

* Section 8(b)(7), 29 U.S.C. 158(b)(7), provides in part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * * *

Interpretation of the words "threaten, coerce, or restrain" in Section 8(b)(4)(ii) to encompass secondary consumer picketing is not inconsistent with *National Labor Relations Board* v. *Drivers, Local 639 (Curtis Bros.)*, 362 U.S. 274. In that case, the Court held that peaceful picketing for recognition by a minority union was not barred by Section 8(b)(1)(A), which makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." Nowhere in its long opinion did the Court indicate that the words "restrain or coerce" were incapable of encompassing peaceful picketing. Rather, the Court held that the legislative history of Section 8(b)(1)(A) showed that Congress did not intend by that provision to inject the Board into the thorny area of peaceful picketing for recognitional or organizational purposes. Just the opposite case is presented here. As we now show, it is clear that Congress did intend that the terms "threaten, coerce, or restrain" used in Section 8(b)(4)(ii) would reach consumer picketing.

B. THE LEGISLATIVE HISTORY OF SECTION 8(b)(4)(ii) ESTABLISHES THAT CONGRESS GAVE SPECIFIC CONSIDERATION TO THE BANNING OF SECONDARY CONSUMER PICKETING AND DREW THIS SECTION TO ACCOMPLISH THAT RESULT

Any doubt as to the intention of Congress to prohibit picketing of a secondary employer that is addressed to his customers, without regard to its actual effect upon such employer, is dispelled by the legislative history of Section 8(b)(4)(ii) and the publicity proviso. Section 8(b)(4)(ii) was added to the Act in

1959 by the Landrum-Griffin amendments.[10] The old Section 8(b)(4)(A) barred only secondary boycotts that were achieved by inducing work stoppages by secondary employees. See *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 98. This left it open to unions to accomplish the same objective by such other means as threatening the secondary employer directly with a work stoppage,[11] or by engaging in consumer picketing at his place of business.[12] Congress regarded these decisions as loop-

[10] For a summary of the background of the amendments and their passage through Congress, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257; Ryan, *Secondary Boycotts Under the New Labor-Management Reporting and Disclosure Act of 1959*, 34 St. Johns L. Rev. 42; Note, 62 Col. L. Rev. 1336.

[11] See *Sealright Pacific, Ltd.*, 82 NLRB 271, 272, n. 4; *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 911–912 (C.A. 2).

[12] See *National Labor Relations Board* v. *Business Machine & Office Appliance Mechanics Conference Board*, 228 F. 2d 553, 559–561 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *International Union of Brewery Workers*, 272 F. 2d 817, 819 (C.A. 10); *United Wholesale & Warehouse Employees, Local 261* v. *National Labor Relations Board*, 282 F. 2d 824 (C.A. D.C.). See also, *Upholsters Frame and Bedding Workers (Minneapolis House Furnishing Co.)*, 132 NLRB 40, 41–42 (1961); R. 39–40.

In conflict with these decisions, the Fifth Circuit has recently held that consumer picketing not only threatens, coerces or restrains the neutral employer in violation of the newly added Section 8(b)(4)(ii)(B), but such picketing also acts as an inducement to neutral employees to stop work and thus would also violate Section 8(b)(4)(i)(B), which, like the old Section 8(b)(4)(A), merely covers secondary boycotts brought about by

holes and sought to close them in Section 8(b)(4)(ii) by making it unlawful for a union "to threaten, coerce, or restrain any person" for the proscribed secondary object.

Such a provision first appeared in the Administration bill, which was introduced by Senator Goldwater.[12] Testifying in its behalf, Secretary of Labor Mitchell stated:

> If amended as proposed, the secondary boycott provision will apply to coercion of employers to cease doing business with another. The effect of this type of secondary activity is no less damaging upon employers and employees and no less contrary to the public interest than is

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inducing or encouraging workers to engage in a strike or a refusal in the course of employment to perform work. *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, Nos. 18748, *et al.*, decided July 18, 1963 (Rives, J. dissenting on this point), 53 LRRM 2800, 2807-2808. We submit that the Fifth Circuit's view that consumer picketing not only appeals to members of the public, but also necessarily induces employees to engage in work stoppages, is based on the erroneous premise that picketing—irrespective of the legend on the signs, the place where it is conducted, or the steps taken by the union to limit the effect of the picketing—is *per se* a signal to employees to stop work. This premise has uniformly been rejected by other courts of appeals (see cases *supra*), and it is contrary to the understanding of Congress in enacting Section 8(b)(4)(ii). See also the proviso to Section 8(b)(7)(C) (n. 8, *supra*), which specifically recognizes a distinction between informational picketing and picketing which is designed to induce work stoppages by employees.

[12] See Sec. 503(a) of S. 748, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 142.

the type of secondary activity presently prohibited by the act.[14]

However, the bill which was reported by the Senate Committee (the Kennedy-Ervin bill) made no changes in the old Section 8(b)(4)(A). This omission was criticized in a minority report issued by Senators Goldwater and Dirksen, which pointed out:[15]

> (1) *Coercion of employers.*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the "employees" of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and threaten employer B with a strike or picket line if he continues to do business with employer A. * * * So, B readily succumbs to the union pressure and tells A he no longer wishes A's products or will no longer supply raw materials to A, and in so doing no one has violated present law. But

[14] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 86th Cong., 1st Sess., S. 505, *et al.*, p. 266.

[15] S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 79 (Minority Views), 1 Leg. Hist. 475.

> look at the situation of employer A. Perhaps B is his primary customer or supplier. His alternative is to yield entirely to the unions' demands * * * or go out of business. Countless examples of actual cases corresponding to this hypothetical have been presented to congressional committees in various hearings since 1947.

On the floor of the Senate, Senator McClellan proposed an amendment to Section 8(b)(4) which would, *inter alia*, have made it unlawful "to exert any economic or other coercion against * * * any person" for the proscribed objects.[16] He explained that it would close some of the loopholes in the existing law, including—

> pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishipg a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union * * *.[17]

This amendment was rejected,[18] and the Kennedy-Ervin bill passed the Senate without changing the old Section 8(b)(4)(A).[19]

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[16] 105 Cong. Rec. 6666, II Leg. Hist. 1193.

[17] 105 Cong. Rec. 6667, II Leg. Hist. 1194.

[18] 105 Cong. Rec. 6671, II Leg. Hist. 1198.

[19] The Senate merely adopted a provision banning "hot cargo" agreements in the trucking industry. Sec. 707(a) of S. 1555 as passed by the Senate, I Leg. Hist. 582.

The Landrum-Griffin bill, which was introduced in the House, contained a provision similar to the Administration bill, making it unlawful "(ii) to threaten, coerce, or restrain any person" for the forbidden objects.[20] Congressman Griffin, one of the sponsors, explained that this clause was intended to cover the situation where, "instead of going to B's employees the union official goes directly to B and threatens him with labor trouble or other consequences, unless he stops dealing with company A."[21] Later, the following colloquy between Congressmen Griffin and Brown ensued:[22]

> Mr. BROWN of Ohio. * * *
>
> My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentlemen's bill?
>
> Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act.[23] It will be recalled that the case involved

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[20] Sec. 705(a) of H.R. 8400, I Leg. Hist. 681.

[21] 105 Cong. Rec. 15532, II Leg. Hist. 1568.

[22] 105 Cong. Rec. 15672-15673, II Leg. Hist. 1615.

[23] In a radio broadcast several evenings before, President Eisenhower had urged the enactment of legislation which would check, *inter alia*, the following activity (105 Cong. Rec. 19954, II Leg. Hist. 1842):

"Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organizing officials * * * picket the stores which sell the fur-

a dispute with a company that manufactured furniture. Let us understand that we are not considering * * * the right to picket at the manufacturing plant where the dispute exists.

Mr. BROWN. * * * That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. GRIFFIN. Then we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN * * * In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN * * * But the Griffin-Landrum bill would?

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niture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

"* * * This kind of action is designed to make the stores bring pressure on the furniture plant and its employees—to force those employees into a union they do not want. This is an example of a secondary boycott.

"I want that sort of thing stopped * * *."

Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. BROWN * * * Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing——

Mr. BROWN * * * Advertising.

Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

The Landrum-Griffin bill passed the House with the (ii) provision described above, and went to the Conference Committee along with the Kennedy-Ervin bill. Senator Kennedy and Congressman Thompson, in an analysis of the Landrum-Griffin bill, critized the (ii) provision on the ground that it would ban, not only consumer picketing at a secondary employer's premises, but other forms of consumer appeals as well.[24] The Landrum-Griffin provision was adopted

[24] The analysis noted (105 Cong. Rec. 16591, II Leg. Hist. 1708, emphasis added):

"The House bill provides that a union may not 'restrain' or 'coerce' an employer where an object is to require him to cease doing business with any other employer. The prohibi-

by the Conference Committee, but to avoid such a blanket ban on consumer appeals, which some members of Congress felt might present a constitutional problem, the publicity proviso—excepting certain forms of publicity "other than picketing"—was added. Explaining the proviso to the full Senate which was considering the report of the Conference Committee, Senator Kennedy stated (emphasis added):"

> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. *We were not able to persuade the House conferees to permit picketing in front of that secondary shop,* but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. *In other words, the union* can hand out handbills at the shop, can place advertisements in newspapers, can make announce-

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tion reaches *not only picketing* but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.

"Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sell Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

"The House bill outlaws such appeals to the general public for assistance in winning fair labor standards. * * *"

" 105 Cong. Rec. 17898–17899, II Leg. Hist. 1432.

ments over the radio, and *can carry on all publicity short of having ambulatory picketing in front of a secondary site.*"

Senator Goldwater, another member of the Conference Committee, added:"

> This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B * * *. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B

" Note also the following colloquy between Senators Kennedy and Dirksen which occurred when, while the bills were in the Conference Committee, the Senate conferees reported to the Senate on the progress being made (105 Cong. Rec. 17328, II Leg. Hist. 1378):

"Mr. DIRKSEN * * * We got into a tizzy * * * about a mattress plant located, let us say, in Raleigh, N.C., which has a very good customer in St. Louis, Mo. They have a labor dispute in Raleigh, and the pickets show up at the customer's plant in St. Louis. We spend a day discussing what shall appear on the signs. Can they put something in the newspapers? Can they go on the radio? * * *

"Mr. KENNEDY * * * In that case, we have receded on the question of consumer picketing of a secondary employer.

"Now we are going quite far in limiting the right of unions, the traditional right to carry on picketing. And I will say to the Senator that on the point which he raises we have already agreed to the House position."

" 105 Cong. Rec. 19771, II Leg. Hist. 1857.

> the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute * * *."

And Congressman Thompson, another conferee, pointed out (emphasis added):

> 2. Consumer appeals: The right to publicize nonunion goods to consumers, without causing a secondary work stoppage is recognized in the conference agreement. Employees will also be entitled to publicize, *without picketing*, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for a consumer boycott would have been barred by the House bill."

The opponents of the bill took the same position. In fact, the ban of secondary consumer picketing was one of the reasons stated for their opposition. Thus, Senator Morse, a member of the Conference Committee, emphasized the precise prohibition at issue here

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[10] Senator Goldwater also stated (105 Cong. Rec. 17904, II Leg. Hist. 1437) that, with "some clarifying provisions," the conferees adopted the House bill on secondary boycotts, which also reflected the provisions of the Administration bill and the one introduced by Senator McClellan. He pointed out (*ibid.*):

"The Senate bill did not deal with the subject of secondary boycotts. The House bill, however, closed up every loophole in the boycott section of the law including the use of a secondary consumer picket line, an example of which the President gave on his nationwide TV program on August 6."

See also 105 Cong. Rec. 19849 (Senator Dirksen), II Leg. Hist. 1823.

[11] 105 Cong. Rec. 18133, II Leg. Hist. 1720.

as one of the reasons why he did not sign the Conference Report on the bill:[30]

CONSUMER PICKETING

> This bill * * * also makes it illegal for a union to "coerce, or restrain." This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, "Do not buy X shoes." This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer. * * *

This history makes it clear that the President, proponents and opponents of the bills, and the members of the Conference Committee, which compromised the differences between the Senate and House bills, all gave specific consideration to the question whether to prohibit secondary consumer picketing, and in the end, with full understanding of the import of the action, the Congress determined to do so. The unanimity of expression of Congressional understanding of Section 8(b)(4)(ii) is overwhelming. Congress accepted the view, advanced by the President during the debate, that the mere existence of a consumer picket line imposed the threat of business loss which would tend to restrain and coerce the secondary

[30] 105 Cong. Rec. 17882, II Leg. Hist. 1426.

employer, and thereby exert pressure on him to cease doing business with the primary employer. Accordingly, by the words "threaten, coerce, or restrain," it determined to ban such picketing without requiring, or awaiting, a showing that it actually caused the secondary employer economic loss or otherwise coerced him.

As the Fifth Circuit pointed out in enforcing the Board's order against consumer picketing in *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, No. 18748, *et al.*, decided July 18, 1963, the requirement imposed by the court below of showing that the picketing caused actual injury to the neutral employer (53 LRRM at 2806):

> deprives § (ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under * * * what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions

> which would inhere in every secondary consumer picketing demonstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered. [Footnote omitted.]

In sum, Congress has acted clearly and with stated intent to ban secondary consumer picketing. Its action, in our judgment, must be enforced in this case unless the Court holds that the Constitution protects such picketing as free speech. Congress did not intend, and the words of the statute do not impose, a requirement that the picketing be shown to have had an adverse effect on the secondary employer. The specific words of the proviso and the extensive legislative history leave no room for doubt or for an interpretation of the terms "threaten, coerce, or restrain" to reach a contrary conclusion. Thus, the constitutional question is squarely and simply presented.

II

SECTION 8(b)(4)(ii) AS APPLIED IN THIS CASE IS CONSTITUTIONAL

Initially, it should be noted that the conduct at issue under Section 8(b)(4)(ii) is limited to secondary consumer picketing. As the Fifth Circuit pointed out in *Perfection Mattress, supra* (53 LRRM 2806), "* * * the means of communicating the message to members of the public, including customers, actual or

potential, of any secondary employer are effectually open through the § 8(b)(4) proviso." As noted above (*supra*, pp. 5, 6, n. 5), the Union had engaged in handbilling at the premise of all the Safeway stores, but, consistent with the proviso, this was not made the subject of the Board's complaint. Thus, the constitutional question—which the court of appeals strove to avoid by its interpretation of the statute—is whether, where the union has at its command all other means of publicity to be used in aid of securing a boycott by the secondary employer, the banning of consumer picketing is prohibited by the First Amendment."[21]

It is settled law that "while picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464. It "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (concurring opinion). Picketing "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Building Service Employees* v. *Gazzam*, 339 U.S. 532, 537.

Accordingly, it has been established, in a series of cases, that "a State, in enforcing some public policy

[21] The court of appeals, because of its interpretation of the words of the statute, did not reach this question. However, it indicated that in a proper case it would have to determine "whether the explicit exemption of other forms of communication from the reach of the statute saves its constitutionality." See R. 64–65, n. 11 and cases there cited.

• • • could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters* v. *Vogt*, 354 U.S. 284, 293.[12] And, in *Electrical Workers, Local 501* v. *National Labor Relations Board* (*Langer*), 341 U.S. 694, it was held that Congress had the same power. There it was contended that the ban against inducement or encouragement of work stoppages by secondary employees, contained in the old Section 8(b)(4)(A) (and continued in the current Section 8(b)(4)(i)(B)), could not constitutionally be interpreted as reaching such inducement or encouragement as flowed from the mere imposition of a picket line at the premises where the employees were at work. The Court rejected this contention, stating (341 U.S. at 705):

> • • • The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgement of free speech • • •. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives [citing *Gazzam, Hanke, Hughes,*

[12] See *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (picketing to compel a violation of the state antitrust law); *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532 (picketing to compel the employer to force his employees to accept the union as their representative); *Teamsters* v. *Hanke*, 339 U.S. 470 (picketing to compel self-employed persons to join the union); *Hughes* v. *Superior Court*, 339 U.S. 460 (picketing to compel retail stores to hire a certain proportion of negroes); *Plumbers Union* v. *Graham*, 345 U.S. 192 (picketing to compel an "all union" job); *Teamsters* v. *Vogt*, *supra*, (picketing to compel the employer to force his employees to join the union).

Giboney, supra]. There is no reason why Congress may not do likewise.

The Union and the court below seek to distinguish *Electrical Workers* on the ground that the picketing there was addressed to employees who were union members, whereas here it was merely addressed to members of the public. It is argued that Congress could constitutionally regulate the former because it is a "signal" to action, *i.e.*, such picketing makes an appeal to individuals who "are subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions" (R. 63); and when they see the picket line, they can be expected to respond to it. Picketing which appeals to the public, on the other hand, has no such "signal" effect and is "closer to the core notion of constitutionally protected free speech" (R. 63–64); to ban it, so the argument goes, runs afoul of the First Amendment, at least absent a specific showing that the picketing has imposed economic injury.

This distinction, however, was presented and rejected in *Hughes* v. *Superior Court*, 339 U.S. 460. In that case, a group of pickets peacefully patrolled the premises of a store owned by Lucky Stores, Inc., to compel the employer (Lucky) to hire Negro clerks on a proportional basis in relation to the number of Negro customers. The picket signs read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." The picketing was peaceful and orderly; the pickets did not prevent customers or employees of Lucky from going to and from the

store; and the picketing was unaccompanied by threats, misrepresentation, or intimidation. Nor was there a finding that the picketing in any way affected Lucky's business. The California Supreme Court nevertheless upheld an injunction against the picketing, on the ground that the objective of the picketing was contrary to declared state policy against discrimination in hiring (32 Cal. 2d 850, 198 P. 2d 885). It did so over the dissent of Justice Traynor, who contended that, since the picketing did not possess "signal" aspects, it could not constitutionally be enjoined (32 Cal. 2d 871, 198 P. 2d 897). This Court affirmed the California court, holding that the picketing was validly enjoined, for "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations," i.e., to compel employment on the basis of racial grounds (339 U.S. 460, 464).

The Court—speaking about the kind of consumer picketing there involved and not merely about picketing which is a signal to employees—explained (339 U.S. 464–465):

> But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" [quoting from *Wohl, supra*]. Publication in a newspaper, or by distribution of circulars, may convey the same

> information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

Accordingly, the Court concluded, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted *or the purpose which it seeks to effectuate gives ground for its disallowance*" (*id.* at 465–466, emphasis added).

In short, *Hughes* demonstrates that peaceful picketing in furtherance of an illegal objective may be constitutionally interdicted even though it is not a "signal" to *employee* action, but seeks to attain its objective merely through an appeal to consumers not to patronize.[33]

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[33] As one informed commentator has observed:

"What difference is there between the sympathetic cooperation of the public, on the one hand, and of workers, on the other? * * * All picketing is obviously conducted to coerce. The desired coercion is achieved through convincing customers not to enter, by persuading loyal employees to withdraw, by influencing job hunters to remain away, and by enlisting the aid of all other union folk with a prejudice against crossing picket lines. I do not suggest that peaceful picketing coerces those whose aid is requested. But I doubt if much support is won on intellectual conviction as to the merits of the cause. Most of it is probably induced by a combination of fear, prudence and social embarrassment—a sort of psychological coercion which compounds itself ultimately into economic coercion on the picketed business." Gregory, *Constitutional Lim-*

Nor is *Hughes* distinguishable on the ground advanced by the court below. Thus, the court acknowledged that, "even if picketing is in a given case 'pure speech,' this does not bar Congress from prohibiting such appeals," but it can do so only "if the gravity of the evil the legislature seeks to prevent, discounted by its improbability, justifies the infringement." In the view of the court of appeals, this test was met in *Hughes*, but a statutory ban on consumer picketing would not meet it, absent a showing of a "substantial economic impact" upon the secondary employer (R. 64).

Nothing in *Hughes* requires that, before the legislature may regulate the evil which the picketing seeks to further, it must be shown that the picketing has had a "substantial economic impact." There was no such showing in *Hughes;* all that was established was that the picketing attempted to bring about an objective which the legislature had a legitimate interest in proscribing. So here, in amending the Act in 1947 and again in 1959, Congress decided that the secondary boycott was a substantive evil which, if not checked, would unduly enlarge the area of labor disputes and disrupt the free flow of commerce. This judgment by Congress is enough, without more, to warrant a ban on picketing which seeks to achieve a secondary boycott. The validity of this analysis is confirmed by *Electrical Workers, supra.* While *Electrical Workers* involved picketing which was directed at employees, the Court's rationale clearly does not turn on that fact.

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itations on the Regulation of Union and Employer Conduct, 49 Mich. L. Rev. 191, 207 (1950).

Indeed, the Court cited *Hughes* in support of its holding (341 U.S. 705, n. 10), a case which, as we have shown, involved consumer picketing similar to that here."

As the Fifth Circuit stated in *Perfection Mattress, supra*, in concluding that Congress could constitutionally ban consumer picketing in furtherance of a secondary boycott (53 LRRM at 2806–2807):

> In our view of the evolutionary development of free speech and picketing, we do not share the view of the District of Columbia Court of Appeals which regards as the distinguishing element the presence or absence of a likelihood that the particular picketing will be a "signal" for action by the *employees* of the secondary employer. One thing is certain from the 1959 Amendments. Congress regarded the pressuring of a secondary *employer* as much an evil as efforts to induce or encourage his employees to strike or not to handle goods. The aim of the law is to free interstate commerce from the disruptive consequences of labor strife. In the legislative judgment, to "signal" *persons* into a sympathetic refusal to handle goods is no more obstructive than to bring about the same ultimate objective—cessation of business with the primary employer—through coercive pressures on the secondary employer. To tag one

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" The above analysis is not inconsistent with such cases as *Thornhill* v. *Alabama*, 310 U.S. 88, and *Chauffeurs, Local Union 795* v. *Newell*, 356 U.S. 341. Those cases involve legislative or injunctive bans drawn in "sweeping and inexact terms" (*Carlson* v. *California*, 310 U.S. 106, 112), which impose a blanket prohibition against all peaceful picketing irrespective of the legitimacy of the object.

> method as "consumer picketing" does not afford a constitutional insulation denied to the other. When the purpose of the conduct is the same, it is for Congress to determine that similar restraints may be imposed. [Footnotes omitted.]

In sum, the Board's conclusion that Section 8(b)(4)(ii)(B) of the Act bans peaceful consumer picketing in front of a secondary establishment, without regard to the demonstrated effect of such picketing, is consistent with the language of the statute and its legislative history, and presents no constitutional question. The Board's interpretation is thus entitled to stand.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order.

Respectfully submitted.

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SEPTEMBER 1963.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to

cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

The relevant provisions of the National Labor Relations Act, as it existed prior to the 1959 Amend-

ments (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services;

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

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